No. 14,505

IN THE

United States Court of Appeals

For the Ninth Circuit

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,

Appellant,

vs.

FIDALGO ISLAND PACKING CO.,

Appellee,

CLARA WILSON,

Intervenor.

Upon Appeal from the District Court for the District of Alaska, Fourth Division.

REPLY BRIEF FOR APPELLANT.

J. GERALD WILLIAMS,
Attorney General of Alaska.
EDWARD A. MERDES,
Assistant Attorney General.
Juneau, Alaska.
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

INDEX

CITATIONS

Cases

Statutes

Texts and Law Review Articles

No. 14,505

IN THE

United States Court of Appeals

For the Ninth Circuit

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,

Appellant,

vs.

FIDALGO ISLAND PACKING CO.,

Appellee,

CLARA WILSON,

Intervenor.

Upon Appeal from the District Court for the District of Alaska, Fourth Division.

REPLY BRIEF FOR APPELLANT.

This brief has been prepared as a reply to arguments in appellee's brief, which, if left unanswered, may leave the Court with an incomplete picture of the true underlying issues involved in this litigation.

PRELIMINARY CONSIDERATIONS.

Above all else, the Alaska Employment Security Commission wishes to impress upon the Court that

there are only two fundamental issues involved herein:

(1) The jurisdictional issue of appellee's right to sue in behalf of all seasonal employees in Alaska, and

(2) the effect and validity of the seasonality regulation No. 10 as it pertains to the appellee-employer, and the nonseasonal intervenor-employee.

Any digressions from these issues should be carefully noted, as, for example, the somewhat strained and repeated effort of the appellee to establish a cause and effect relationship between the promulgation of regulation No. 10 and the alarming depletion of the Unemployment Trust Fund.[1]

ARGUMENT.

The following questions raised by statements in the appellee's brief should be satisfactorily answered in order that the Court may have a clear perspective of the case:

---

[1]The most disturbing and paradoxical element in this law suit is the extremely contradictory position the appellee takes, i.e., its contention that the fund should be preserved, yet urging the Court to set aside a regulation that was and is designed to actually save approximately one-half million dollars for the fund.

I.

JURISDICTIONAL QUESTION.

May an employer (appellee) and a nonseasonal employee (intervenor) champion the rights of every seasonal cannery employee in Alaska?

The record discloses that there is not one word of testimony or a single shred of evidence by, or in behalf of, a *seasonal employee* of the canned salmon industry. Nor did the intervenor (a nonseasonal employee) appear in Court to present any evidence, either personally or by deposition or affidavit. The sole true party in interest throughout is the appellee, Fidalgo Island Packing Company, a nonresident salmon-packer employer. It alone produced witnesses and evidence in support of the contention that seasonality regulation No. 10 is void, and therefore a half-million dollars in benefit payments are being illegally withheld from certain *seasonal employees* in Alaska's canned salmon industry.

Appellee bases its alleged right to champion the rights of all Alaskan seasonal cannery employees on the allegation in its complaint that it is bringing this suit in behalf of all salmon packers and their employees. (Pp. 29-30 of appellee's brief.) Appellee further states that, "This is a class action, and it is brought under Rule 23 of the Federal Rules of Civil Procedure . . ." (P. 35 of appellee's brief.)

In its answer, the appellant denied the above allegation, thereby putting the matter of plaintiff's representation of all seasonal cannery employees to proof. (R. 18.) A careful examination of the record

discloses that there is not one scintilla of evidence in support of the allegation put in issue. Therefore, the conclusion is inescapable that the Fidalgo Island Packing Company appears solely on its own behalf.

An examination of Rule 23(a) will demonstrate that appellee cannot represent seasonal employees, either in a "true" or "spurious" class action. Rule 23 states:

> "Rule 23. Class Actions.
>
> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is .
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Moore's *Federal Practice,* 2d Edition, Vol. 3, at p. 3435 defines a true class suit as follows:

> "The 'True Class Suit' is one wherein, but for the class action device, the joinder of all inter-

ested persons would be essential. This would be cases where the right sought to be enforced was joint, common or derivative."

The "spurious" class suit is defined by Judge Clark, a co-author of the Federal Rules, in *California Apparel Creators v. Wieder of California, Inc.* (C.C. A. 2d 1947), 162 F. 2d 893, cert. denied 68 S.Ct. 156:

"So far as these plaintiffs assume to represent others they can do so only by virtue of subd. (3) of Rule 23(a), F.R.C.P., which has been commonly referred to as granting authority for the so-called 'spurious' class suit. None of the requirements of subds. (1) and (2) are fulfilled; and the basis of representation is only, as indeed plaintiffs themselves assert, the existence of common questions of law or fact affecting the several rights. But this is merely a device of permissive joinder of plaintiffs, found unnecessary under state procedures and only helpful in the facilitation of the broad disposition of suits within the confines of federal jurisdiction. It does not grant authority to adjudicate finally rights as to non-appearing parties or to confer any additional substantive rights upon the plaintiffs suing. (Citing numerous authorities.) Hence, the rights of the rest of the 4,500 potential plaintiffs are actually not to be settled here, and we cannot give judgment as though they were. We stress this point because at times there appear to be suggestions that the representative character of a suit may aid recovery. Of course where there is a true class suit, as in *Gibbs v. Buck,* supra (Sec. 23.08, n. 7), the consequences are otherwise . . ."

In *Weeks v. Bareco Oil Co.* (C.C.A. 7th, 1951), 125 F. 2d 84, the Court dismissed a spurious class suit on the ground, among others, that there was no showing that any other member of the class favored or even knew of the suit.

Moore, in Vol. 3, 2d Edition, supra, at p. 3423, states:

> "An action, of course, is not a class suit merely because it is designated as such in the pleadings; whether it is or is not depends upon the attending facts. But the complaint, or other pleading initiating a class action, should allege the existence of necessary facts, i.e., the existence of a class, that the members thereof are so numerous as to make it impracticable to bring them all before the court, that claimant adequately represents the class, etc. . . ."

And at p. 3425, Moore states:

> ". . . In the hybrid class action, the plaintiff, although instituting his action on behalf of himself and others similarly situated, does not 'in fact' represent anyone but himself."

In order for a party to adequately represent a class, he must obviously be a member of the class and his interests must be wholly compatible with and not antagonistic to those whom he would represent. (Moore's *Federal Practice,* supra, p. 3423.)

In the case at bar, the appellee not only is not a member of the employee class but has in fact an antagonistic interest to the employees it claims to represent. The conflict is apparent when it is noted that the appellee-employer states it is the theory

of the law and should be the object of the administration of the Act to create a fund surplus and thereby cause the appellee and other employers to obtain experience rating credits. (P. 18-19 of Appellee's brief.) This results in a divergence of interests, for when seasonal employees secure benefits from the fund they reduce and deplete it, thereby decreasing the possibility of an employer receiving the desired experience rating credits. It is inconceivable that an identity of interests can be found to exist between the appellee-employer and seasonal employees which would authorize the employer to bring suit in behalf of such employees, who are an entirely separate and antagonistic class. It is inescapable that appellee cannot in law represent all or any one of the seasonal cannery employees in Alaska. The same reasoning applies in the case of the intervenor, since she, like the appellee-employer, is not in the seasonal class, and therefore there exists a diversity, rather than a similarity, of interests between the two classes, i.e., seasonal as compared to nonseasonal employees.

In view of these considerations, neither the appellee nor the intervenor may maintain this action. *Jeffrey Manufacturing Co. v. Blagg,* 235 U.S. 571, 576. There the Supreme Court asserted:

> "Much of the argument is based upon supposed wrongs to the employee . . . No employee is complaining of this act in this case. The argument based upon discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this

> court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of."

And in *Griffin v. Sheldon,* 174 F. 2d 382, this Court stated:

> "There is nothing in the pleadings or proof to indicate that the plaintiff has a particular right of its own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard, he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people." (Citing numerous cases.)
>
> Cf. *Mullaney v. Hess*, 189 F. 2d 417, and *Hess v. Mullaney*, 213 F. 2d 635, 640.

Appellee contends that the case of *Culver v. Bell & Loffland,* 146 F. 2d 29 (9th C.C.A., 1945) (p. 35 of appellee's brief), controls herein and is therefore authority for the institution of this action in behalf of all Alaskan nonseasonal employees. In the *Culver* case, supra, the complaint alleged that "this action is brought for and in behalf of themselves, and other employees similarly situated." (146 F. 2d 30.) The lower Court refused to permit amendments that would have added 38 more employees as plaintiffs, on the ground that the claims represented thereby

were not similar to those of the three named plaintiffs. This Court reversed, holding that the act permitting resort to representative suits should be liberally administered by the Courts. It should be carefully noted that in the *Culver* case, supra, the plaintiffs were employees suing in behalf of themselves and other employees of the same class for overtime pay under the Fair Labor Standards Act. In the instant case, the Fidalgo Island Packing Company and a nonseasonal employee are purporting to represent untold numbers of seasonal employees whose basic interests are actually hostile and antagonistic to those of their purported representatives. It is further observed that Rule 23, F.R.C.P., is not even mentioned in the *Culver* case.

II.

IRREPARABLE DAMAGES.

Have the appellee and intervenor shown irreparable damages or a threat thereof resulting from the enforcement of seasonality regulation No. 10?

On page 18 of its brief, appellee makes this statement:

> ". . . If plaintiff is obliged to pay into this fund any amount of money which, under some regulation such as the one in question, may not be credited to plaintiff for the purpose for which it was paid in, plaintiff has been irreparably injured . . ."

In the lower Court the appellee argued that as a result of the rapid depletion of the fund, ". . . the

contributors are bound to suffer injury and the employees are bound to suffer irreparable injury . . ." (P. 15 of appellant's brief.) The lower Court held that the claim of alleged irreparable damage ". . . is based, in the main, on the progressive elimination of the fund . . ." (R. 52.)

The lower Court made the following findings of fact concerning the manner in which the appellee allegedly has been irreparably injured (R. 60):

> "12. That the plaintiff has been irreparably injured and will be further irreparably injured by the application of pretended amended regulation No. 10 to it and others on whose behalf this action is brought, for the reason (1) that the pretended amended Regulation No. 10 does not set up the proper seasons or periods during which they carry on their fishing and canning operations in the Territory and (2) it does not properly define the seasons, which would result actually in making some employees of the plaintiff and others seasonal, and other employees nonseasonal, although all are engaged in the same employment." (Captioned numbers added.)

Both of these grounds are met on page 18 of appellant's brief, where it is shown that the canned salmon industry requested that a seasonality regulation be issued based upon the open fishing season prescribed by the Federal Fish and Wildlife Service. Appellee is now most certainly estopped to deny any alleged irreparable injury resulting from the promulgation of the very type of regulation it requested to be issued. Furthermore, it can hardly be disputed

that the Commission is in the better position to "set up the proper seasons or periods during which they carry on their fishing . . ." This points to an additional reason why appellee should be denied judicial review until after the regulatory commission has had an opportunity to consider these type objections. It may very well have been that the Commission would have changed the regulation to appellee's liking had it been given a chance to do so.

In findings of fact No. 18 (R. 63), the lower Court found that the appellee has already been injured and will be further injured if the fund is depleted, for, in such an event, much greater employer contributions will be required to continue payments. First, the most obvious fallacy in this finding is the fact that the regulation which is the subject matter of this suit actually is designed and does preserve the solvency of the fund; and second, there is no evidence showing in what manner the appellee is irreparably injured. In no event shall the contributions be increased by anyone save the legislature, and when and if such contributions are raised or lowered, there are numerous complex factors, of which seasonality constitutes only one narrow element, that enter into a final decision. Appellee has not shown that it has paid one extra cent in contributions between the time of this suit and the present, resulting from the promulgation of seasonality regulation No. 10.

As indicated in the above quote from page 18 of appellee's brief, the argument is presented for the first time that the enforcement of regulation No. 10

causes monies appellee paid into the fund "not be credited to plaintiff for the purpose for which it (the monies) was paid in." This argument is not in accord with reality or the proof submitted by Fidalgo Packing Company in the course of the trial. Regulation No. 10 most certainly does not cause monies to be credited for purposes other than those for which it was paid in. The enforcement of the regulation, in reality, causes monies to be retained in the fund that would otherwise be paid out.

As to the intervenor's status, appellee is forced to admit that due to the fact that she is a nonseasonal employee "she will no longer be injured by the fact that the seasonal regulation as applied to her, is unrealistic." (Quoted on p. 23 of appellant's brief.)

These arguments clearly exemplify the paradoxical position appellee has taken throughout the litigation in its attempt to portray itself as a representative of the employees. There is simply no causal relationship between the employer, the employee, the enforcement of the regulation, the depleted fund, and the irreparable damages the appellee and intervenor are allegedly suffering thereby.

Does the fact that only certain salmon industry employers were seasonably classified during the four-month period between the effective date of Section 7 of Chapter 99 Session Laws of Alaska 1953 and the date suit was filed (July 30, 1953) constitute hostile and illegal discrimination against said employers?

Appellee's argument, in a few words, is simply this: Construction industry employers were not sea-

sonally classified; certain salmon industry employers were so classified; therefore, the regulation setting the season periods for salmon packers is void.

The Commission, or Mr. McLaughlin representing it, may very well have intended to consider the status of other industries, including the construction industry, with a view of seasonally classifying several of them. But no such opportunity was given, for suit was filed before the Commission's staff had completed the job of even classifying salmon industry employees. Furthermore, regulation No. 10 has no relation whatever to this issue. If the salmon industry feels that construction industry employers should also be seasonally classified, the proper remedy would appear to be that it apply for a writ of mandamus ordering the Commission to so classify them. The improper approach would seem to be what the salmon industry has pursued herein by filing suit to enjoin a pro-trust fund regulation.

III.

EXHAUSTION OF REMEDIES.

Is an appeal to the Commission a condition precedent to judicial review?

Appellee appealed directly to the District Court and thereby failed to utilize two separate administrative channels:

(1) An appeal from the determination of seasonality; and

(2) an appeal from the promulgation of the regulation which set the seasonal periods.

Appellee gives three reasons why it did not pursue such an administrative appeal:

(1) The regulation is void and made by one wholly without authority. (P. 14 of appellee's brief.)

(2) The law makes no provision for an appeal from the determination of an executive director. Only an appeal from a determination by the "Commission" is provided for. (P. 15 of appellee's brief.)

(3) Even if a "Commission" regulation were involved, the law does not require a prior administrative appeal "except at the option of the employer or of a person interested." (P. 16-17 of appellee's brief.)

Reason No. 1 begs the argument for the validity of the regulation is in issue before this Court. Even if the regulation were invalid, respected authorities hold that such invalidity is no excuse for failing to lodge an administrative appeal. (See authorities on pages 26 and 27 of appellant's original brief.)

Reason No. 2 presupposes that the executive director was not delegated authority to act in the name of the Commission and even if he did act in its name, he exercised an improper or illegal delegation of authority. Section 51-5-1(f) A.C.L.A. 1949 states that the Commission can be ". . . any person to whom

this Commission may delegate its powers and duties . . .'' The evidence shows such a delegation was made. (R. 161, 162.) The regulation was promulgated by the executive director pursuant thereto.

Reason No. 3 is supported by appellee's interpretation of Section 7 contrary to the plain wording of the statute. When Section 7(c)(2) states that the aggrieved employer or other interested party ''may appeal,'' it means that an administrative appeal may be lodged, but if such an appeal is not perfected, the aggrieved party is foreclosed from the right of judicial review.

On the face of the placard, which placard constituted the notice of determination herein, is the statement that unless an appeal is taken to the Commission within fifteen days, the seasonal determination shall become final. (Defendant's Exhibit ''B''—R. 32.)

If the law permitted an appeal from an administrative ruling only at the discretion or option of the employer or other persons aggrieved, then the very purpose of a preliminary administrative hearing would be frustrated, for no person would pursue an expensive and time-consuming administrative appeal if he were allowed to go directly into the District Court for a final determination. Appellee's interpretation does violence to the underlying purpose behind the concept of having administrative bodies assist the Courts by setting forth their opinions, as expertees, before the District Court must undertake to become specialists in the particular field involved.

IV.

VALIDITY OF THE REGULATION.

Did the Commission have authority to delegate regulation-making power?

This point is covered on pages 28 through 30 of appellant's brief. In summation, it can be stated that Section 51-5-1(f) authorizes the Commission to delegate its power and duties, and since such a delegation was made by the Commission to its executive director, the regulation promulgated thereby is valid.

The trial Court stated that the determination of seasonality is one of the most important functions of the Commission, and it is therefore inconceivable that it could delegate such power to its executive director.

Because of the Territory's vast geographical area and the fact that the executive director, with a full-time staff, is in a manifestly better position to at least make the *initial determination* of seasonality, it would seem that the legislature intended to encourage commissions to delegate authority to their executive heads to make initial determinations. Such authority of the particular executive director herein to make initial determinations is clear from the 1938 delegation of authority (R. 161, 162) authorized by Section 51-5-1(f), which retains for the Commission the power at their next meeting to "either approve or disapprove such rules and regulations." Under the circumstances of this case, if the executive director had not issued regulation No. 10 on June 29, 1953, but instead had waited for the first meeting of the

Commission, which was held on August 6, 1953, he would have been derelict in his duty. June 30th was the deadline date in which to issue the seasonality regulation, and failure to do so would have resulted in a half-million dollar loss to the fund.

Does the regulation conform with the statute?

Appellee contends that even if the executive director had power to issue regulation No. 10 under the old law, he did not comply with Section 51-5-2(c)(1), which provides for investigations and hearing before a determination is made. (P. 12 of appellee's brief.) This section is inapplicable, since the appellant issued the regulation under authority of Chapter 99 S.L.A. 1953, which statute repealed, among others, Section 51-5-2(c)(1).

Appellee further contends that if the executive director acted under Chapter 99 S.L.A. 1953, then the regulation did not comply with the law, since it places seasonality on an industry basis rather than on an individual employer basis and that no authority could be delegated by a commission not yet in existence. (P. 12 of appellee's brief.)

This contention is answered on pages 42 through 44 of appellant's brief. An examination of the regulation discloses that its sole purpose is to prescribe a seasonal period for previously determined individual employers. The regulation states, in part:

> "The Commission accordingly prescribed:
>
> I. Seasonal periods . . . for certain employers . . .

III. Reporting by seasonal employers:
Employers having been determined by the Commission to be seasonal employers and so notified shall report . . ."

The contention by the appellee that the executive director could not have been delegated any authority until the new board was to meet, several months after the date of the promulgation of regulation No. 10, presupposes that the old commission would be defunct prior to the new commission taking office. Appellee completely disregards the doctrine of simultaneous repeal and re-enactment. As we have shown on pages 31 through 34 of our brief, because of the virtually identical wording of the repealing and the repealed Acts, said doctrine applies. Therefore, until the new board convened, the old board could validly function and its actions have the force and effect of law.

V.

JUDICIAL NOTICE.

Did the District Court err by ruling, in effect, that every employer in the Alaskan construction industry is seasonal in fact?

On page 33 of appellee's brief, this statement is made:

"It is certainly a matter of common and general knowledge everywhere that you cannot construct bridges, excavate ground, pour concrete and erect buildings in Western and Interior Alaska during the winter months."

But does appellee mention that construction work, among other things, also consists of inside plumbing, electrical wiring, heating, etc., inside newly-constructed buildings? Thousands of men are doing that type of work during the colder months. Typical of this type winter construction is the Eklutna project near Anchorage. The appellant chose to ignore this phase of year-round construction.

The Court, by judicially noticing that the Alaskan construction industry is seasonal (save Ketchikan and vicinity), in effect regards these construction employers, who employ electricians, etc., during the winter months, as being seasonal employers as a matter of law, when, as a matter of fact, they are full-time employers. The lower Court's ruling on this point is erroneous.

Good authority exists for the proposition that (a) judicial notice shall not be taken unless the litigant against whom the judicially noticed matter is to be used is given notice and opportunity to be heard as to the propriety of taking judicial notice and the exact content of the matter to be noticed, and (b) the judge is bound to decline to take such notice if the matter is not clearly indisputable. (See Morgan, *Judicial Notice,* (1944), 57 Harvard Law Review 269; Morgan, *Evidence* (1946), Practice of Law Institute, P. 2; Rules 801-806, *Model Code of Evidence.*) The Court gave no notice or opportunity to the appellant to be heard relative to the propriety of its taking judicial notice that Alaska's construction industry is seasonal. Furthermore, as stated above, the mat-

ter of which it took judicial notice is clearly disputable.

CONCLUSION.

For the reasons shown in appellant's opening brief and in the reply brief, it is respectfully submitted:

1. That appellee and intervenor have no legal right to appear in behalf of all canned salmon employees in Alaska.

2. That the decree of the District Court should be reversed to the extent that it holds that regulation No. 10 is void or that appellee and intervenor were irreparably damaged, regardless of its validity.

3. That, as a matter of law, the appellee and intervenor have not shown that they have been irreparably damaged.

4. That the case should be remanded to the District Court for entry of a decree declaring regulation No. 10 to be valid, dissolving the permanent injunction, and dismissing appellee's complaints.

Respectfully submitted,

J. GERALD WILLIAMS,
Attorney General of Alaska,
EDWARD A. MERDES,
Assistant Attorney General,
Attorneys for Appellant.